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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 432

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES OF AMERICA AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 18–29) is reported at 291 F. 2d 336. The order of the Federal Maritime Board[1] (Pet. App. 30–31) has not been officially reported.

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[1] On August 12, 1961, pursuant to Reorganization Plan No. 7 (H. Doc. 187, 87th Cong., 1st Sess.), the Federal Maritime Commission succeeded to the regulatory functions of the Federal Maritime Board. The Federal Maritime Commission and its predecessors are hereinafter referred to as the "Commission."

JURISDICTION

The court of appeals entered its judgment on April 27, 1961 (Pet. App. 18). By order of Mr. Justice Black, dated July 25, 1961, the time for filing a petition for a writ of certiorari was extended to September 22, 1961, and the petition was filed on that date. The jurisdiction of this Court is invoked under 5 U.S.C. 1040 and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly affirmed an order of the Commission holding that a tariff filed pursuant to a basic agreement approved by the Commission under Section 15 of the Shipping Act of 1916 does not require prior approval by the Commission in order for the rates, and explanatory rules and practices embodied therein, to become lawfully effective.

STATUTES INVOLVED

Section 15 of the Shipping Act of 1916, as amended, 46 U.S.C. 814, is set out in Appendix A of the petition (pp. 16–17). The pertinent provisions of Public Law 87–346, 75 Stat. 763, 764, enacted October 3, 1961, read as follows:

> * * * tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof * * * agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

STATEMENT

The petitioner, Empire State Highway Transportation Association, Inc., is composed of motor carriers engaged in the transportation of freight which has been imported or is destined for export through the Port of Greater New York. The intervenors below operate terminal facilities at the Port and load or unload the freight carried by petitioner's members. Intervenors have formed a conference and the Commission, pursuant to Section 15 of the Shipping Act of 1916, has approved the basic conference agreement (FMB agreement No. 8005), which authorizes the members to "establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices" (Pet. 21).

On January 15, 1960, the conference filed Tariff No. 5 pursuant to the approved conference agreement, increasing the rates charged by more than 15 percent.[2] The new rates were to become effective on February 15, 1960, and were in fact put into effect on that date without having been approved by the Commission (Pet. 21–22). Petitioner filed a complaint with the Commission on February 16, 1960, charging various violations of the Shipping Act of 1916, but later amended the complaint and limited the charge to an allegation that the filed tariff constituted an agreement or a modification of the basic conference agreement within the meaning of Section 15 of the Act and thus could not lawfully become effective without prior Commission approval. The Commission granted the

[2] The tariff also made three minor changes in the explanatory rules accompanying the various rates schedules.

intervenors' motion to dismiss the amended complaint and entered an order stating that "[it has been] consistently * * * held [by the Commission] that the issuance and modification of tariffs pursuant to an approved basic agreement are not new agreements, or modifications of agreements, requiring prior Section 15 approval" (Pet. 30–31).

On appeal, the court below affirmed, holding that while "[i]n a literal sense the tariff is an agreement as to rates" within the meaning of Section 15, "the problem is not solved" by such a literal reading and that this language must instead be considered along "with other provisions of the statute in the light of a long legislative and administrative history" (Pet. 22–23). The court found significant the Commission's "unusually impressive" and "long administrative practice" of holding conventional rate changes lawful even though they are "unaccompanied by prior [Commission] approval" (Pet. 24). The court also stressed the "awareness by Congress of the [Commission's] interpretation over a very considerable period, during which Congress considered the [Act] several times with no change in section 15 as administratively interpreted" (Pet. 27). Finding that petitioner's contention "would make the present statute unworkable" (Pet. 25) and, in effect, impose "more stringent controls" over rates in foreign commerce than Congress has legislated for the more heavily-regulated domestic water traffic (Pet. 26), the court concluded that "[i]f a different position is now to be adopted * * * it should be at the hands of Congress" (Pet. 29).

ARGUMENT

The petition presents no important question of law warranting review by this Court. On the contrary, the question involved is of no general interest since the contested Commission practice has now been specifically affirmed by amendment to the governing statute.

1. An amendment to Section 15 of the Shipping Act, enacted October 3, 1961, provides that "tariff rates * * * shall be permitted to take effect without prior approval," thereby directly confirming the previous Commission practice. Public Law 87-346, 75 Stat. 764. This statute effectively disposes of whatever future importance the decision below might otherwise have had and limits its import to the particular case. So considered the decision raises no question warranting further review by this Court.

2. The decision below is in any event correct. This Court has recognized that the interpretation of a statute administered by an agency is in the first instance a question for that agency and that a long-established construction and interpretation is entitled to great weight. *United States* v. *Eaton,* 169 U.S. 331, 343; *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 130-131.

The Commission's practice in respect to rate changes has been settled for over 30 years. Since 1927, the expression "every agreement" in Section 15 has been defined so as to exclude therefrom "routine operations relating to current rate changes." *Ex Parte 4, Section 15 Inquiry,* 1 U.S.S.B. 121, 125. And this position had been reaffirmed with respect to the

basic agreement involved in this case in *Empire State Highway Transportation Ass'n* v. *American Export Lines*, 5 F.M.B. 565. This long-standing interpretation by the Commission acquired greater significance since, as the court of appeals noted (Pet. 27), it had been directly brought to the attention of Congress on several occasions when related legislative questions were under consideration, and Congress never saw fit to make any changes in Section 15 which would alter the practice.[5]

3. Petitioner asserts that the court of appeals "has either overlooked or misread the principles enunciated by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., etc.*, 350 U.S. 332" (Pet. 7). In that case it was held that the Natural Gas Act, 15 U.S.C. 717 *et seq.*, did not authorize a regulated natural gas company furnishing gas under contract with a distributing company unilaterally to change the rate specified in the contract by filing a new schedule with the Federal Power Commission. But the issue involved in that case was solely one of the power of a natural gas company, without the consent of the other contracting party, to change the rates to which it had bound itself by contract, a question in no wise involved

[5] The court of appeals also noted that the theory advanced by petitioner "would make the present statute unworkable" (Pet. 25). "A total of 32,503 rate filings covering freight and passengers was received [by the Federal Maritime Commission] during the [fiscal] year" ending June 30, 1960. Annual Report of the Federal Maritime Board and Maritime Administration, p. 36 (1960). Since Section 15 makes it unlawful to carry out any agreement before Commission approval, none of these rates could have, in petitioner's view, become operative before administrative review.

here. It was undisputed in that case that, if the other contracting party had agreed to the change (or if the rate had not been fixed by contract), the change would have become effective without prior Commission approval. It is only that question, undisputed in *Mobile*, that is involved here—whether prior Commission approval is required to make effective a rate that would otherwise have been valid as between the parties—and petitioner's entire argument is based on a provision of the Shipping Act (Section 15) totally unlike anything in the Natural Gas Act.

Petitioner's allegation of conflict between the instant case and the decision of the same court of appeals in *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, is likewise without merit. *Isbrandtsen* involved the inauguration of a new system of dual-rate contracts calling for exclusive patronage by contracting shippers, and was not concerned with a simple change in rate levels. It offers no support for the view that every conventional rate change must have prior Commission approval in order to be lawful; in fact, the court of appeals expressly noted in *Isbrandtsen* that the inauguration of the dual-rate system there involved was not an "interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement." 211 F. 2d at 56.

CONCLUSION

The decision below is correct and no grounds warranting further review are presented.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

RICHARD A. SOLOMON,
Attorney.

JAMES L. PIMPER,
Acting General Counsel,

ROBERT E. MITCHELL,
Assistant General Counsel,

EDWARD APTAKER,
Assistant General Counsel,

NORMAN D. KLINE,
Attorney,
Federal Maritime Commission,

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